Supreme Court, U.S.
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No. _____

(1)

In The

Supreme Court of the United States

H.C. MASSEY, the former executive director of the Ogden [Utah] Area Community Action Committee, Inc.,

Petitioner,

v.

BOARD OF TRUSTEES OF THE OGDEN AREA COMMUNITY ACTION COMMITTEE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED

1. Did the Supreme Court's decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. ___, 148 L.Ed. 2d 807, 121 S.Ct. 924 (2001), eliminate the need for a plaintiff in a case brought under 42 U.S.C. § 1983 and who establishes the existence of state action in general on the part of the defendant to also establish state action in the specific action of which the plaintiff complains?

2. Did the involvement of State of Utah agencies and officials and local county and city agencies and officials in the affairs of the Ogden [Utah] Area Community Action Committee, Inc., satisfy the "public entwinement" test articulated in the *Brentwood Academy* case?

3. If so, wouldn't the Board of Trustees of the Ogden [Utah] Area Community Action Committee, Inc. be a state actor and wouldn't its actions in making important managerial decisions be state action?

4. Did the Tenth Circuit fail to properly apply summary judgment principles when it held that the Board of Trustees of the Ogden [Utah] Area Community Action Committee, Inc., was not engaged in state action when it terminated Mr. Massey's employment?

PARTIES TO THE PROCEEDINGS

Petitioner is H.C. Massey, the former Executive Director of the Ogden [Utah] Area Community Action Committee, Inc.

Respondent is the Board of Trustees of the Ogden Area Community Action Committee, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Tenth Circuit opinion (App. A) is not yet (and may not be) reported.

The district court opinion (App. B) is not reported.

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was entered on February 13, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of the Fourteenth Amendment and 42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff, H.C. Massey, an African American, brought this case under 42 U.S.C. § 1983. He alleged the Board of Trustees of the Ogden Area Community Action Committee, Inc. (hereinafter referred to as "OACAA"), acted "under color of state law," that is, that it was a state actor engaged in state action when it terminated his long-term employment as Executive Director of the Ogden Area Community Action Committee in November 1997. Mr. Massey alleged that he had a constitutionally cognizable property interest in his employment, of which the Board, as a state actor engaged in state action, deprived him without due process of law when it terminated his employment.

In particular, Mr. Massey alleged Utah State officials influenced the Board to terminate his employment by (1) "stacking the deck" – facilitating the removal of Board members who were favorable to Mr. Massey and who would vote to continue his tenure, and engineering the placement on the Board of several individuals who had direct or indirect ties with the State (through their employment) who were not favorable to Mr. Massey and who would (and who did) vote to terminate Mr. Massey's employment; (2) "diluting the mix" – interfering with the election of representatives of minority and low income groups to the Board so as to reduce the representation on the Board of groups who had historically supported Mr. Massey; (3) "blackmail" – threatening to discontinue funding various programs for the community action agency unless the Board terminated Mr. Massey's

employment; and (4) working "behind the scenes" to encourage the Board to find reasons to justify terminating Mr. Massey's employment. Thus, Mr. Massey alleged that the Board was a state actor engaged in state action when it terminated his employment as the OACAA's Executive Director and that when the Board did so, the Board deprived him of a property interest without due process of law, all in violation of the Fourteenth Amendment and 42 U.S.C. § 1983.

B. Proceedings Below

Early in the litigation, the Board filed a Motion to Dismiss Mr. Massey's claims that the Board which terminated his employment was improperly constituted and that the Board had not complied with its by-laws and procedures regarding the election of representatives of minority and low income groups to the Board. The District Court for the District of Utah granted said Motion to Dismiss on the ground that Mr. Massey, as an employee subject to the by-laws, had no standing to challenge the Board's actions.

Later, the Board filed a Motion for Summary Judgment on Mr. Massey's claim that the Board was a state actor involved in state action which had deprived him of a property interest without due process in violation of the Fourteenth Amendment. The District Court granted this Motion on the ground that the Board's decision to terminate Mr. Massey's employment did not constitute state action.

Mr. Massey appealed pursuant to 28 U.S.C. § 1291.

On February 13, 2001, the Court of Appeals for the Tenth Circuit affirmed, holding that whatever the links between the State and the Board were, there was no link between the State and Mr. Massey's termination.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Conflicts with a Recent Decision of the Supreme Court. Petitioner's Evidence Satisfies the Entwinement Test. Petitioner Didn't Need to Also Satisfy the Coercion or Encouragement Tests.

The Tenth Circuit's decision was filed February 13, 2001. One week later, the Supreme Court decided the case of *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. ___, 148 L.Ed. 2d 807, 121 S.Ct. 924 (2001).

The *Brentwood Academy* case clarified the line between state action subject to Fourteenth Amendment scrutiny and private conduct that is not subject to such scrutiny. The decision of the Tenth Circuit is in some ways in conflict with the subsequently decided *Brentwood Academy* case. The chief conflict is with the Tenth Circuit's apparent position that a plaintiff bringing a case under 42 U.S.C. § 1983 must not only establish that the defendant(s) engaged in state action in general but also establish that there was state action in the particular action or decision at issue, or, put another way, that a plaintiff bringing an action under 42 U.S.C. § 1983 must establish both (1) that the defendant is a "state actor;" and (2) that

in doing whatever particular act is complained of, the defendant was engaged in "state action."

In the *Brentwood Academy* case, the Supreme Court seemed to adopt a different rule – namely, that a plaintiff need only establish state action in general under one of several tests but not under all tests and a plaintiff who establishes that a defendant engages in state action need not necessarily show a link between the State and the particular action alleged to constitute a violation. The Court held that if, for example, the facts of the case satisfy the "public entwinement" test, the plaintiff may not need to also satisfy the "coercion" or "encouragement" tests, that is, show direct control or coercion over the particular decision at issue.

The Supreme Court should grant the petition to eliminate any potential for confusion over a plaintiff's burden of proof in cases under 42 U.S.C. § 1983. Does *Brentwood Academy* mean that a plaintiff who satisfies one of the tests for state action in general need not show that such state action extends to the particular decision at issue or does a plaintiff still bear that burden? In any event, the Supreme Court may want to have the lower courts reconsider their holdings in the instant case in light of its holding in the recent *Brentwood Academy* case.

In the *Brentwood Academy* case, the Supreme Court explained that its cases have identified a number of different criteria or tests that can bear on the issue of whether the actions of an ostensibly private actor can be held to due process standards. "Facts that address any of these criteria are significant, but no one criteria must

necessarily be applied." 531 U.S. ___, 148 L.Ed. 2d 822, 121 S.Ct. 934.

Under the general concept of "fair attribution," the Supreme Court noted that there are multiple criteria and multiple tests that a plaintiff can seek to satisfy to establish state action and that if he satisfies one of such tests, he need not satisfy all other tests or indeed any other tests.

Accordingly, the Supreme Court instructed that when certain facts show satisfaction of one test or criterion, a court may and should find state action, and the implication of state action is not affected by pointing out that the same facts might not loom large under a different test.

The Court explained that if the facts justify a conclusion of state action under one criterion, then there is state action. This is so even if the facts do not support a finding of state action under various other criteria which have been or could be applied in other cases.

In *Brentwood Academy*, the Supreme Court also recognized that facts that address any of the criteria may be significant. "[N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government." 531 U.S. ___, 148 L.Ed. 2d 817, 121 S.Ct. 930. "Our cases have identified a host of facts that can bear on the fairness of such an attribution." Id.

Using this framework, the Court noted one test or criteria is the "entwinement" test – do the facts indicate

public entwinement in the control and management of ostensibly separate and private entities?

In *Brentwood Academy*, the Court found the facts satisfied the "entwinement" test. The Court found that the facts established pervasive entwinement of public institutions and public officials in the composition and workings of a statewide association formed to regulate athletic competition among public and private secondary schools. That was sufficient for the Court to find state action. "[When] the facts justify a conclusion of state action under the criterion of entwinement, [such] a conclusion is in no sense unsettled merely because other criteria of state action may not be satisfied by the same facts." 531 U.S. ___, 148 L.Ed. 2d 821, 121 S.Ct. 934.

Like the "entwinement" test, "coercion" and "encouragement" are other tests to which facts can be applied to determine whether private action can be characterized as public. In *Brentwood Academy*, the Association had argued that the State hadn't coerced or encouraged the actions complained of. The Supreme Court rejected that argument: "For the same reason, it avails the Association nothing to stress that the State neither coerced nor encouraged the actions complained of. . . . When, therefore, the relevant facts show pervasive entwinement to the point of largely overlapping identity, the implication of state action is not affected by pointing out that the facts might not loom large under a different test." 531 U.S. ___, 148 L.Ed. 2d 821-822, 121 S.Ct. 934.

Thus, under the *Brentwood Academy* holding, if the relevant facts do show pervasive entwinement, a plaintiff satisfies the requirement of establishing "state action"

and it doesn't matter if the state neither encouraged nor coerced the particular action complained of.

Applying the public "entwinement" test to the instant case would compel a different result.

The facts in the instant case satisfy the public entwinement test. The State of Utah, through its officials and in particular, the Director of the Community and Economic Development's Community Services Office, had funding, training, monitoring and termination power over many programs of the OACAA. Ms. Ann Kagie was a regular and involved participant in Board meetings, discussions and decisions. In addition, the Board was composed, in large part, of representatives of (or employees of) Weber County, Ogden City, South Ogden City, Washington Terrace City, Roy City, Utah State University, Weber State University and the Utah State Department of Workforce Services. The evidence, viewed in the light most favorable to Mr. Massey, established that there were multiple entwining links between the State and the Board.

The Tenth Circuit, however, did not focus on the multiple connections between the State and the OACAA. It focused only on whether there was a specific link between the State and Mr. Massey's termination. But the *Brentwood Academy* case seems to suggest that if Mr. Massey can satisfy the public entwinement test in the macro sense, such a showing is sufficient to withstand summary judgment and he need not show state action in the micro decision in question. If the facts satisfy such a test and demonstrate public entwinement in the management and control of the OACAA, in general, such that the Board is

a state actor, then Mr. Massey need not have to show a link between the State and his termination, that the State actually and directly dictated the particular action complained of. The Tenth Circuit imposed too onerous of a burden on a plaintiff resisting summary judgment in a 42 U.S.C. § 1983 action.

The Supreme Court should use the instant case as an opportunity to clarify its ruling in *Brentwood Academy* and set forth whether a plaintiff's establishing that an entity or person is a state actor under any criteria is sufficient to withstand summary judgment or whether a plaintiff must also raise a fact question as to state action in the particular decision complained of. This issue is vitally important to virtually all community action agencies around the country.

II. There is no Value at Odds with Finding and Imposing Public Accountability in the Instant Case.

In *Brentwood Academy*, the Supreme Court also recognized a balancing is necessary, that is to say, that even if the facts require a finding of state action or are sufficient to show public action under any one of the tests, a conclusion of state action may, nevertheless, be outweighed by some value at odds with finding public accountability in the circumstances. There may be some countervailing reason against attributing activity to the government. Id., 148 L.Ed. 2d 822, 121 S.Ct. 934.

Such other values or reasons could be:

1. A projected "tidal wave" of federal litigation; or
2. The existence of other possible avenues of relief.

In *Brentwood Academy,* the Supreme Court did not find any value to have an effect sufficient to outweigh the finding of state action.

Applying the *Brentwood Academy* balancing to the instant case would not uncover any countervailing interest. In the instant case, there is no outweighing value. Mr. Massey had been Executive Director of OACAA for approximately 27 years. He had been very successful in such role, had never received a poor performance appraisal (all appraisals had been above satisfactory) and should have been given a due process hearing to try to preserve his employment.

III. The Tenth Circuit Departed from Applicable Summary Judgment Principles In Weighing the Evidence as to the Validity of the Reasons for Mr. Massey's Termination.

Applying the now apparently discredited premise that a plaintiff must show both that the defendant is a state actor (state action in general) and state action in coercing the particular decision at issue, the Tenth Circuit was supposed to view the facts in the light most favorable to Mr. Massey and draw all reasonable inferences flowing therefrom in the light most favorable to Mr. Massey.

Instead of doing so, the Tenth Circuit weighed the evidence and found no link between the State and the Board's decision to terminate Mr. Massey. It found that "[a]ll major sources of funding identified problems with OACAA's compliance with rules." Close scrutiny of its

opinion and the record reveals the Tenth Circuit usurped the fact finder's role.

Mr. Massey, in his brief in opposition to the Motion for Summary Judgment, had explained that the allegations against him were not factual and that he was hard at work responding to certain alleged deficiencies in administration and style and that his actions preserved rather than cost the funding in jeopardy.

For example,

1. The Tenth Circuit identified the U.S. Department of Health and Human Services as one source of funding which had issued an ultimatum that the Board had to terminate Mr. Massey. Mr. Massey's evidence, however, was that he organized an effort to fight HHS' proposed termination of funding, spearheaded the effort to submit a quality improvement plan for the OACAA's Headstart program so as to address HHS' concerns, and worked hard to obtain eventual approval of OACAA's quality improvement plan so as to prevent loss of Headstart funding.

2. The Tenth Circuit also identified the State of Utah, Department of Community and Economic Development, Division of Community Development, as another source of funding which identified problems with Mr. Massey's management. Mr. Massey's evidence, however, was that he was involved in fighting the State's notification of intent to terminate the State Community Services Block Grant funding to OACAA and that at the time the Board acted to terminate him, neither the Headstart or CSBG programs had been cut off.

3. The Tenth Circuit also identified that when the Board hired an independent investigator to investigate what one Board member had worked up as employee concerns that ought to be investigated, said investigator found serious flaws in Mr. Massey's management skills and personal style. But Mr. Massey's evidence was that the charges against him were false, not substantiated by reliable evidence and in some cases, were based on complaints from employees who had written letters to the Board in support of Mr. Massey. Mr. Massey's testimony was that the reasons given in the Board's letter of termination were false. Indeed, the Tenth Circuit went beyond the reasons the Board gave. For example, the Tenth Circuit referred to an HHS audit but the Board hadn't mentioned anything about an HHS audit in its termination letter.

The Tenth Circuit was supposed to view the facts in the light most favorable to Mr. Massey and to draw all reasonable inferences in his favor. Had it done so, the Tenth Circuit would have found that Mr. Massey was responsible for helping to cure the Agency's supposed deficiencies and preserve its funding. Instead of doing this, the Tenth Circuit did the opposite and found Mr. Massey to blame for the State's efforts to cut off funding to the OACAA.

For the Tenth Circuit to weigh the evidence and determine that the Board had good cause to terminate Mr. Massey without a meaningful due process hearing was contrary to applicable summary judgment principles. Such was not viewing the facts in the light most favorable to Mr. Massey and drawing all reasonable inferences in

his favor. The Supreme Court should grant the writ to correct this departure.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted

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Appendix A Opinion of the United States Court of Appeals for the Tenth Circuit, dated and filed February 13, 2001

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

H.C. MASSEY, Plaintiff-Appellant, and MARY DEAN; WOODROW FLOWERS; JAMES H. GILLESPIE; ELIZA HILL; DOROTHY LEE; JIMMY LONG; LILLIAN MEDINA; BETTY SAWYER; DUNNESE SCOTT, Plaintiffs, v. BOARD OF TRUSTEES OF THE OGDEN AREA COMMUNITY ACTION COMMITTEE, a non-profit corporation, Defendant-Appellee.	)	No. 00-4037 (D.C. No. 97-CV-124) (D. Utah)

ORDER AND JUDGMENT*

(Filed Feb. 13, 2001)

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Before **BRISCOE, PORFILIO**, Circuit Judges, and **MARTEN**, District Judge**.

Plaintiff H.C. Massey (Massey) appeals the district court's order of summary judgment in favor of defendant the Board of Trustees of the Ogden Area Community Action Committee, Inc. (Board). We exercise jurisdiction pursuant to 28 U.S.C. § 1291, and affirm.

Massey was executive director of Ogden Area Community Action Committee, Inc. (OACAA), a nonprofit corporation established "to stimulate a better focusing of all available federal, state and local resources to aid low income individuals" in Ogden, Utah, and the surrounding area. Aplt. Br. at 4-5. The Board claimed it terminated Massey's employment for "just cause." *Id.* at 94. Massey sued the Board and several of the Board members who voted to uphold his termination, alleging he was wrongfully terminated without due process in violation of 42 U.S.C. § 1983. All defendants moved for summary judgment, arguing they could not be found in violation of § 1983 because they were not state actors. The district court agreed and granted summary judgment in favor of the defendants. Massey appeals this decision only as to the Board.

We review the district court's grant of summary judgment de novo, applying the same legal standard as the district court. *See Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1225 (10th Cir. 2000). "Summary judgment is

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** The Honorable J. Thomas Marten, United States District Judge, District of Kansas, sitting by designation.

appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Id.* (citing Fed. R. Civ. P. 56(c)). "When applying this standard, we review the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Id.*

Section 1983 "creates a cause of action against individuals who violate federal law while acting 'under color of state law.' " *David v. City & County of Denver*, 101 F.3d 1344, 1353 (10th Cir. 1996); *see also* 42 U.S.C. § 1983. "[T]he only proper defendants in a Section 1983 claim are those who represent [the state] in some capacity, whether they act in accordance with their authority or misuse it." *Gallagher v. "Neil Young Freedom Concert"*, 49 F.3d 1442, 1447 (10th Cir. 1995) (internal quotation omitted).

Massey alleges the Board was a state actor engaged in state action. His theory is that Utah state officials influenced the Board to terminate him. More specifically, he contends that Anne Kagie, Director of the Community Services Office of the Utah State Department of Community and Economic Development, orchestrated his termination.

Whether an action was taken "under color of state law" or whether it was a "state action" are two separate areas of inquiry. *See Pino v. Higgs*, 75 F.3d 1461, 1464 (10th Cir. 1996). However, since "state action necessarily constitutes action under color of state law," *id.*, the Board can be held liable if it was a state actor engaged in state action. "Application of the state action doctrine has been

characterized as one of the more slippery and troublesome areas of civil rights litigation." *Gallagher*, 49 F.3d at 1447. The Supreme Court has taken a "flexible" approach, *see id.*, applying four different tests, referred to as the nexus test, the symbiotic relationship test, the joint action test, and the public functions test, *see Anaya v. Crossroads Managed-Care Sys., Inc.*, 195 F.3d 584, 595 (10th Cir. 1999). Each test requires very fact-specific inquiries. *See Gallagher*, 49 F.3d at 1448. It appears that Massey is invoking two of these tests.

Massey implicates the nexus test by arguing that a state "can be held responsible for a private decision only when it . . . has provided such significant encouragement, either overt or covert, that the decision at issue must be deemed to be that of the State." Aplt. Br. at 30-31 (citing *Blum v. Yaretsky*, 457 U.S. 991 (1982)). Under the nexus test, courts consider whether " 'there is a sufficiently close nexus' between the government and the challenged conduct such that the conduct 'may be fairly treated as that of the State itself.' " *Gallagher*, 49 F.3d at 1447 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

Massey also relies upon the symbiotic relationship test – "the cumulative effect of all of these links amounted to a symbiotic relationship that presented a question of fact as to the existence of state action." Aplt. Br. at 33-34. Under the symbiotic relationship test, courts inquire whether the state " 'has so far insinuated itself into a position of interdependence' with a private party that 'it must be recognized as a joint participant in the challenged activity.' " *Gallagher*, 49 F.3d at 1451 (quoting *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972)).

A review of all the evidence indicates that Massey cannot meet either test. There is no link between Massey's termination and the state. Rather, what prompted Board action were negative reports from many sources about Massey's management of OACAA. All major sources of funding identified problems with OACAA's compliance with rules. A U.S. Department of Health and Human Services (HHS) audit of OACAA's Head Start program uncovered substantial noncompliance with financial and administrative procedures. For example, HHS found OACAA was "unable to produce accurate and complete disclosure of financial data of the agency," and could not "accurately account for expenditures by grant year and funding period." Aplt. App. at 19. The audit found the deficiencies so grave that continuance in the Head Start program required that OACAA take various actions no later than June 19, 1997, including:

> OACAA must reconstitute the Board of Directors to assure that, at a minimum, a quorum of Board members are seated.
>
> OACAA must act to discharge the present Executive Director from his current position in order to restore public trust and confidence in its program. This objective cannot be met if OACAA allows the Executive Director to remain in his current position.

Aplt. App. at 19.

Massey seeks to establish state action by asserting Kagie was responsible for the audit. Specifically, Massey alleged "the state had called the federal government in Denver and asked the federal government to do certain things to remove [him]," and he believed Kagie made that

call. Aplt. App. at 218. Massey stated a staff member told him someone named Bob at the federal government had called the staff member to say he had been called by a person from the state who wanted Massey fired, and that the person from the state was Kagie. Massey submits no admissible evidence in support of this assertion.

Other funding sources also identified problems with Massey's management. Although the actual audit report identifying the problems is not in the record, a letter from the Utah Department of Community and Economic Development, Division of Community Development, identified contract violations by OACAA that justified contract termination and termination of OACAA's participation in the Federal Community Services Block Grant program and, thus, elimination of funding. *See id.* at 12-13. Massey claims the fact that Kagie signed this letter is "evidence" that she put OACAA's funding in jeopardy. Massey does not contest the allegation that OACAA violated its contract. Rather, he tries to blame the problem on the messenger. This allegation is unsupported.

Further, an independent investigator hired to evaluate various employee grievances filed against Massey found serious flaws in his management skills and possible illegalities in procedures. *See id.* at 166-205. Massey alleges Kagie was "involved" with the grievances, providing the requisite state action. However, he expressly states that he is not alleging Kagie "concocted the complaints against him" or that she influenced the investigation of the grievances. *See* Aplt. Br. at 32. Rather, he contends "Kagie was working behind the scenes to create a fertile environment" for his termination. *Id.* This is not evidence of state action.

The district court's grant of summary judgment in favor of the Board is AFFIRMED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

Appendix B Opinion of the United States District Court for the District of Utah, dated January 31, 2000 and filed February 2, 2000

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

H.C. MASSEY, MARY DEAN, WOODROW FLOWERS, JAMES H. GILLESPIE, ELIZA HILL, DOROTHY LEE, JIMMY LONG, LILLIAN MEDINA, MARY PASS, BETTY SAWYER, DUNNESE SCOTT, and MARGUERITE TREJO, Plaintiffs, vs. BOARD OF TRUSTEES OF THE OGDEN AREA COMMUNITY ACTION COMMITTEE, INC., a non-profit corporation, DONALD R. CARPENTER, BARRY GOMBERG, ELAINE JONES, RUSS LeBARON, ARTHUR MARTINEZ, CHARLES PETTY, and BENNION TUELLER and JOHN DOES 1 through 5, Defendants.	MEMORANDUM DECISION GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Filed Febr. 2, 2000)

I. INTRODUCTION

Defendants move the court for summary judgment as to plaintiff H.C. Massey's ("Massey") claim that he was terminated in November 1997 in violation of 42 U.S.C. § 1983. The material facts relevant to the present motion are generally undisputed and will not be restated here. In brief, however, the Ogden Area Community Action Agency ("OACAA") is a non-profit corporation which assists low income area residents. Funding is provided through a combination of private and government sources. Massey served as Executive Director of OACAA for approximately twenty seven years. By early 1997, OACAA's funding from both the state and federal government was in jeopardy. In the summer of 1997, several employee complaints were made against Massey. The Board hired Ms. Lorrie Lima to investigate the charges against Massey. Based on the Lima Report as well as the other alleged management problems, Massey's employment was terminated on November 25, 1997 by a vote of OACAA's Board of Directors. In a termination letter to Massey dated December 2, 1997, the reasons for his termination were outlined and he was advised that he could appeal the decision to OACAA's Board of Directors on December 10, 1997. Massey appeared with counsel at that meeting.

II. MOTION FOR SUMMARY JUDGMENT STANDARD

Under Fed. R. Civ. P. 56, summary judgment is proper only when the pleadings, affidavits, depositions or admissions establish there is no genuine issue regarding any material fact and the moving party is entitled to

judgment as a matter of law. The burden of establishing the nonexistence of a genuine issue of material fact is on the moving party.[1] *E.g., Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). This burden has two distinct components: an initial burden of production on the moving party, which burden when satisfied shifts to the nonmoving party, and an ultimate burden of persuasion, which always remains on the moving party. *See* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2727 (2d ed. 1983).

When summary judgment is sought, the movant bears the initial responsibility of informing the court of the basis for his motion and identifying those portions of the record and affidavits, if any, he believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. In a case where a party moves for summary judgment on an issue on which he would not bear the burden of persuasion at trial, his initial burden of production may be satisfied by showing the court there is an absence of evidence in the record to support the nonmovant's case.[2] *Id.*, 477 U.S. at 323. "[T]here can be no

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[1] Whether a fact is material is determined by looking to relevant substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

[2] In his dissent in *Celotex*, Justice Brennan discussed the mechanics for discharging the initial burden of production when the moving party seeks summary judgment on the ground the nonmoving party – who will bear the burden of persuasion at trial – has no evidence:

> Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. Such a 'burden' of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. Rather, as the Court

issue as to any material fact . . . [when] a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.*

Once the moving party has met this initial burden of production, the burden shifts to the nonmoving party to designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324.

> If the defendant in a run-of-the-mill civil case moves for summary judgment . . . based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury

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> confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.

477 U.S. at 323 (citations omitted).

> could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . . .

Liberty Lobby, 477 U.S. at 252. The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact on his claim, a trial would be useless and the moving party is entitled to summary judgment as a matter of law. *Id.*, 477 U.S. 242.

III. DISCUSSION

In claim two of his Second Amended Complaint Massey alleges that he was wrongfully terminated without due process in violation of 42 U.S.C. § 1983. To prevail under § 1983, Massey must prove that he was deprived of a federally protected right and that the person or persons who deprived him of his rights acted under color of state law. *Houston v. Reich,* 932 F.2d 883, 890 (10th Cir. 1991); *Haines v. Fisher,* 82 F.3d 1503, 1508 (10th Cir. 1996).

Defendants urge that Massey cannot demonstrate the element of state action and, thus, he cannot prevail on his § 1983 claim. The court agrees. In his opposing pleading Massey concedes that "mere government regulation by itself is not enough to justify a finding of state action. . . . A plaintiff has to show that the state encouraged or caused the deprivation at issue. In other words, government funding or regulation may not be enough, you may

need government encouragement or compulsion or control." Opposition Memo at 12-13.[3] Massey asserts that Ann Kagie, the state government representative from the Utah Community Services Office who dealt directly with OACAA, encouraged and coerced OACAA to terminate him. Massey relies on allegations that Kagie attended board meetings, played a role in reconstructing the board and met with Dr. Carpenter, Chairman of the OACAA Board of Directors, and discussed and planned his termination. The evidence cited by Massey reflects that Kagie attended OACAA board meetings, urged the board to become fully constituted, and worked with Dr. Carpenter to assist OACAA to overcome its various problems. There is no specific evidence that Kagie instructed Dr. Carpenter to terminate Massey. In any event, Dr. Carpenter did not participate in the vote to remove Massey. Although there is evidence for the proposition that Massey's termination by the OACAA Board of Directors was generally welcomed by Kagie, there is no basis for attributing to Kagie, or any other government representative, the deprivation of which Massey complains – his termination without due process. *See Gilmore v. Salt Lake Community Action*

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[3] In a case very similar to this, the Tenth Circuit applied the following test to determine state action.

> First, the deprivation must be caused by the exercise of some right or privilege created by the sate [sic] or by a rule of conduct imposed by the state or by a person for whom the state is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

Gilmore v. Salt Lake Community Action Program, 710 F.2d 632, 637 (10th Cir. 1983) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 1982).

Program, 710 F.2d 632, 638 (10th Cir. 1983) ("at a minimum there must be some showing that the deprivation was in some sense attributable to a government decision"). As in *Gilmore*, Massey has failed to establish that the alleged deprivation resulted from a governmental rule, policy, or decision. The court, after carefully reviewing the evidence, agrees with the position of defendants, summarized by them as follows.

> Massey presented no evidence showing that Ms. Kagie had anything to do with the events that led directly to his termination. Massey does not allege that Ms. Kagie concocted the charges against him, influenced Lorrie Lima in the investigation of those charges, or coerced the Board's decision to terminate Massey after receiving Lima's conclusions. Moreover, it is clear that these charges were the motivation for Massey's discharge. Massey had survived an earlier vote on his future based on his performance in general as executive director. After receiving the charges, however, the Board voted to hire an independent investigator and put Massey on paid leave during the investigation. Massey was terminated by a vote of the Board after it received the Lima report. Thus, there is no connection at all between the state and the Board's motivation for terminating Massey's employment.

Defendants' Reply Memo at 13-14.

Having concluded that Massey has failed to establish state action, the court does not reach defendants' alternative argument that, assuming state action, Massey was provided adequate due process.

IV. CONCLUSION

For the foregoing reasons and except as noted, defendants' motion for summary judgment is GRANTED. The clerk of the court is requested to enter final judgment in this matter.

DATED this 31st day of January, 2000.

BY THE COURT:

/s/ David Sam
DAVID SAM
SENIOR JUDGE
U.S. DISTRICT COURT

United States District Court
for the
District of Utah
February 3, 2000

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 1:97-cv-00124

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Supreme Court, U.S.
FILED
AUG 7 2001
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No. 01-0058

In The

Supreme Court of the United States

H. C. MASSEY, EXECUTIVE DIRECTOR
OF THE OGDEN UTAH ("UTAH AREA")
COMMUNITY ACTION COMMITTEE, INC.,

Petitioner,

v.

BOARD OF TRUSTEES OF THE OGDEN AREA
COMMUNITY ACTION COMMITTEE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Does the "entanglement" test recognized in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 121 S.Ct. 925 (2001), alter the Tenth Circuit's decision upholding summary judgment in favor of Ogden Area Community Action Committee on Petitioner Massey's Section 1983 claim?

II. Did Petitioner Massey establish that Ogden Area Community Action Committee acted under color of state law when it terminated Massey's employment?

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceedings.

The Ogden Area Community Action Committee, Inc. is a private non-profit corporation.

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STATEMENT OF THE CASE

On or about October 27, 1997, H. C. Massey ("Massey") and some individual members of the Board of Trustees of the Ogden Area Community Action Committee, Inc. ("OACAA" or the "Board")[1] filed an action in the U.S. District Court for the District of Utah, seeking to change the membership of the Board of Trustees and to overturn the Board's suspension of Massey from his duties as OACAA's Executive Director. After his termination, Massey amended his lawsuit to allege that he was terminated in violation of his right to due process under 42 U.S.C. § 1983.

OACAA is a private non-profit corporation established to assist low-income residents of Ogden, Utah, and the surrounding area. It is a "community action agency" under 42 U.S.C. § 9902(1). The federal government funds the following OACAA programs: Headstart, Community Service Block Grants ("CSBG") and the Weatherization Program. These programs comprise substantially all of OACAA's funding. The state administers CSBG and Weatherization, while the federal government administers Headstart.

OACAA operates through a board of trustees. The Board is all volunteer and is divided among three groups: (1) at least one-third from low-income sector (elected from neighborhoods); (2) at least one-third from the

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[1] Although the legal name of Respondent is Ogden Area Community Action Committee, Inc., it is commonly referred to as the Ogden Area Community Action Agency. The Board refers to it as "OACAA."

"public sector" (either an elected official (or representative thereof) or an appointed official); and (3) the remainder from the private sector ("officials or members of business, industry, labor, religious, welfare, education, or other major groups and interests in the community"). 42 U.S.C. § 9904(c)(3)(A).

The state monitors OACAA and provides training. Although the state can reduce or terminate the Weatherization or CSBG funding, it may do so only after giving notice and a formal hearing. 42 U.S.C. § 9904(c)(11). Any reduction or termination must then be approved by the U.S. Secretary of Health and Human Services ("HHS"). *Id.*; 42 U.S.C. § 9905a(b). The state has no power to liquidate OACAA or terminate any board member or employee, as OACAA is a private non-profit corporation.

Ann Kagie, Director of the Community Service Office of the Utah State Department of Community and Economic Development, was chief administrator of the Community Service Block Grant Program ("CSBG") for Utah. On occasion, Kagie attended OACAA board meetings and provided technical assistance to the Board.

In December 1996, OACAA submitted a required quality improvement plan to HHS on its Headstart program. The plan was rejected. On May 15, 1997, Beverly Turnbo, HHS Regional Administrator, wrote to the Board and listed numerous deficiencies in OACAA's performance, including the fact that the Board was not properly constituted. In the letter, Turnbo also demanded that OACAA's executive director, Massey, be dismissed.

During December 1996, the state also gave OACAA notice of its intent to terminate the Weatherization contract based on OACAA's failure to properly administer the program. In March 1997, the state gave notice to OACAA of its intention to terminate the CSBG contract for failure to comply with federal regulations. The state also advised the Board that it would not make this recommendation if the Board agreed to a corrective action plan that would restore OACAA to compliance with applicable regulations. In addition, the state advised the Board of an appeal procedure if the Board chose not to accept the corrective action plan.

On May 21, 1997, Massey addressed the Board regarding the threatened loss of Headstart, CSBG and Weatherization funding. The Board decided to conduct a feasibility study regarding Massey's tenure as Executive Director, but it did not do so. Instead, the Board voted in June to retain Massey, notwithstanding the federal ultimatum. The Board also instructed Massey to appeal HHS's determination to cancel the Headstart contract. In short, Massey had been retained as executive director, despite the fact that, under his leadership, OACAA was having serious problems evidenced by the potential loss of substantially all funding and an explicit ultimatum from the federal government that he be replaced.

Ann Kagie assisted the Board in reconstituting itself in accordance with federal law. Kagie worked with the Board Chair, Don Carpenter, Ph.D, an African-American. No evidence exists that any non-minority candidate for a Board position was selected over a minority candidate.

Moreover, no evidence exists that before Massey's termination any existing low-income Board member was dismissed from the Board or that any such member voluntarily resigned. Kagie also assessed OACAA's management and found deficiencies that she communicated to Carpenter and the Board.

In August 1997, three OACAA employees made charges against Massey. The charges included harassment of employees, unfair hiring practices, unfair lunch break rules, wage violations, unfairly "docking" annual leave, forging signatures, making racial slurs, enlisting employees to collect derogatory information about others, enlisting employees to pose as authors of articles Massey wrote regarding his own performance, making negative religious comments, humiliating staff, violating staff privacy, backdating documents, fostering conflicts between employees, imposing unfair time clock rules, and unlawfully failing to pay overtime.

On August 19, 1997, the Board placed Massey on paid administrative leave and hired an independent attorney experienced at investigating EEO complaints to investigate the charges of the OACAA employees against Massey. The investigator met with numerous current and former OACAA employees, the three complaining employees, Massey and his attorney, and two Board members.

In September 1997, while Massey was on administrative leave, OACAA appealed the state's determination to cancel the CSBG contract. It was only after the Board

made significant changes in compliance with the correction action plan that the state decided not to cancel OACAA's CSBG funding.

On November 16, 1997, the independent investigator delivered her report to the Board. The investigator found a majority of the employees' charges against Massey were supported by substantial evidence. No evidence exists of a connection between any state official and the investigator or the results of the investigation.

On November 26, 1997, the Board voted to terminate Massey's employment. In a termination letter of December 2, 1997, the Board referred to the charges and Massey's overall performance. The key factor in the termination was the investigator's report finding substantial evidence to support the serious charges made by employees against Massey. The Board also advised Massey in the termination letter that he could appeal his termination at the December 10, 1997 Board meeting.

Massey and his attorney were invited to the December 10 Board meeting. At the meeting Massey's attorney objected that the Board was not impartial because it had made the initial determination decision based on the investigator's report. Massey's attorney then asked if the investigator and the three complaining employees were present but made no objection on that basis. Massey had not submitted any prior request orally or in writing for any witnesses. Massey's attorney also commented on the lack of time, but did not ask for a continuance or for more time at the hearing, and had not asked for any particular

amount of time before the hearing. Massey and his attorney then left without addressing the merits of Massey's termination.

By Order dated November 13, 1998, the district court dismissed Massey's claims dealing with the composition of the Board of Trustees as state law claims over which the court had no jurisdiction. The parties then conducted discovery on the Section 1983 claim. By Order dated February 3, 2000, the district court granted the Board's motion for summary judgment and dismissed Massey's Section 1983 claim because Massey failed to raise a genuine factual dispute as to his claim of state action in his termination.

The Tenth Circuit affirmed summary judgment on Massey's Section 1983 claim because he failed to show that OACAA acted under color of state law. Accordingly, Massey was unable to establish a genuine dispute of material fact regarding whether the termination was state action for the purposes of his Section 1983 claim.

Massey's Petition seeks review of the Tenth Circuit decision affirming summary judgment for OACAA on Massey's claim under 42 U.S.C. § 1983. On pages 11 and 12 of the Petition, Massey gives examples of how the Tenth Circuit allegedly usurped the factfinder's role. *Massey v. Bd. of Trustees of the Ogden Area Community Action Committee, Inc.*, No. 00-4037 (10th Cir. 2001), *petition for cert. filed*, No. 01-0058. However, Massey's examples are not only immaterial to the grant of summary judgment in favor of OACAA, they are also inaccurate. Massey's first point, that he was working hard to address HHS's concerns regarding OACAA's Headstart program,

is unsupported by the undisputed facts before the lower courts. Petition at 11. HHS approved a revised quality improvement plan by letter dated November 28, 1997, based on a November 3-5, 1997 review. Because Massey had been continuously on administrative leave since August 19, 1997, he could not have contributed to the positive result.

Massey's assertion in point 2 that he was involved in blocking the state's notice of intent to terminate CSBG funding, again, is misleading and not supported by the record. Massey was on paid administrative leave when OACAA appealed the state's decision to cancel the CSBG contract. *Id.*

Finally, in point 3, Massey claims that he came forward with evidence that "the charges against him were false." *Id.* at 12. To the contrary, Massey submitted *no* reliable evidence of this. In fact, although Massey met for two days with the investigator and his attorney and had the opportunity to appeal the Board's termination decision, he presented no evidence and no argument at the December 10, 1997 Board meeting. Other than stating the Board was biased, Massey and his attorney refused to participate further.

Notwithstanding Massey's attempts to challenge the Tenth Circuit's decision, there is no cause for review in this case. The issues are unremarkable, the evidence does not support Massey's statement of the facts, and the Tenth Circuit correctly decided the case.

REASONS FOR DENYING THE WRIT

I.

THE ENTWINEMENT TEST RECOGNIZED IN *BRENTWOOD ACADEMY* DOES NOT CHANGE THE OUTCOME OF THE TENTH CIRCUIT'S DECISION.

This Court's decision in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, et al.*, 531 U.S. 288, 121 S. Ct. 924 (2001), does not warrant granting this Petition. No conflict exists between the *Brentwood Academy* case and the Tenth Circuit's upholding summary judgment for OACAA in this case. Massey opines that in *Brentwood Academy* "the Supreme Court seemed to adopt a different rule" with regard to determining state action. Petition at 5. The entwinement test, however, is simply another possible way to evaluate whether a private entity is acting under color of state law. *Brentwood Academy,* 121 S. Ct. at 934.

Massey is also mistaken in asserting that confusion exists over a plaintiff's burden under 42 U.S.C. § 1983. *Id.* No clarification by this Court is necessary. Like the other tests used to determine state action, the applicability of the entwinement test is made on a case-by-case basis. *Id.* at 930 (a host of facts can bear on the fairness of attributing activity to the government). In the Petition, Massey is merely attempting to repackage the failed argument he made to the Tenth Circuit under the "nexus" and "symbiotic relationship" tests. Petition at 4-9. Even if the "entwinement" test were applied to Massey's Section 1983 claim, Massey's claim would fail.

State action exists under the nexus test if "there is a sufficiently close nexus between the State and the

challenged action of the regulated entity so that the action of the [regulated entity] may be fairly treated as that of the State itself." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (citations omitted). State action exists under the symbiotic relationship test if the state and the private party are so dependent upon each other that the state is viewed as a joint participant in the challenged conduct. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972) (citations omitted). These tests differ from the entwinement test in that under the entwinement test, state action exists if the private character of an entity is "overborne by the pervasive entwinement of public institutions and public officials in its composition and workings." *Brentwood Academy*, 121 S. Ct. at 932.

Massey argues that because one-third of OACAA's Board members are from the public sector, because Ann Kagie, a state employee, attended four out of twelve board meetings (one meeting was after Massey's termination), and because the state monitors OACAA and provides training,[2] there is state action under the entwinement test. Petition at 8. This argument was not sufficient to establish state action under the nexus or symbiotic relationship tests, and it certainly fails to establish pervasive entwinement of public institutions and public officials in OACAA's composition and workings required under the entwinement test. In short, Massey has not

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[2] Massey incorrectly describes OACAA's relationship with the state. Although the state can reduce or terminate federal funding, it may do so only after giving notice and a formal hearing. 42 U.S.C. § 9904(c)(11). And the federal government must approve any reduction or termination in funding. *Id.*; 42 U.S.C. § 9905a(b).

come forward with any evidence to establish that the termination of his employment should be considered state action because of the pervasive "entwinement" of state officials in the structure of OACAA.

It is undisputed that only one-third of OACCA's board is made up of individuals from the public sector. In *Brentwood Academy*, on the other hand, 84% of the Tennessee Secondary Athletic Association ("Tennessee Association") was made up of representatives of public schools. *Id.* at 932. Further, the public school officials controlled and "overwhelmingly perform[ed]" all but the purely ministerial acts by which the Tennessee Association existed and functioned. *Id.* at 932. There is no evidence that any state entity, agent, or employee had this extensive control over OACAA's Board.

In *Brentwood Academy*, this Court also found that "the public schools have largely provided for the [Tennessee] Association's financial support" and that the Tennessee Association enjoyed "the school's moneymaking capacity as its own." *Id.* at 932. Thus, through the activity funding, the Tennessee Association was explicitly an arm of the state of Tennessee. The same cannot be said of the relationship between OACAA and the state of Utah. In fact, federal funds, not state, substantially comprise all of OACAA's funding.

Moreover, in *Brentwood Academy*, the state of Tennessee assigned state Board of Education members ex officio to serve on the board of control and legislative council of the Tennessee Association. *Id.* Even the Tennessee Association's ministerial employees were treated as state employees, as they were able to participate in Tennessee's

state retirement system. *Id.* at 933. The record in this case is void of any such relationship between OACAA's Board and the state of Utah.

And, unlike the *Brentwood Academy* case, there is no evidence here of state regulation. Rather, the undisputed facts show that OACAA hired an outside independent attorney to investigate the charges made by three OACAA employees against Massey. The independent investigator found that the majority of charges were supported by substantial evidence, and OACAA's Board then voted to terminate Massey's employment. In summary, state action does not exist here because OACAA is not overborne by the pervasive entwinement of the state and its officials in OACAA's composition and workings. Thus, Massey's claim fails under the *Brentwood Academy* analysis.

II.

ANN KAGIE'S INVOLVEMENT IN BOARD ACTIVITIES IS NOT STATE ACTION.

Massey has acknowledged that government funding alone of an employer does not make the employer's personnel decisions state actions. Massey claims, however, that state official Ann Kagie controlled the Board to such an extent that the Board's decision to terminate Massey should be considered an act of the state. Again, Massey's argument fails because he has no evidence to support his allegations about Kagie.

In *Lugar v. Edmondsen Oil Co.*, this Court set forth the following two-part test to determine whether conduct

allegedly causing the deprivation of a federal right may be a state action:

> First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

457 U.S. 922, 937 (1982). The first prong of this two-part test requires Massey to show that his own termination was a specific decision attributable to the state, not merely that state officials generally had influence over the Board. *Id.* at 937. The state's obligation with OACAA was to monitor compliance with federal regulations; however, this does not imply that the state would be responsible for individual personnel decisions. In other words, the state can require results without becoming responsible for the community action agency's methods of achieving those results.

Furthermore, there is simply no evidence that Kagie controlled the Board. Of the twelve Board meetings that occurred during the Massey ordeal, Kagie was listed as present at only four, and one of the four meetings was held after Massey was terminated. When Kagie was present at the Board meetings, she said nothing about Massey but discussed issues such as CSBG rules regarding the ownership of the building housing OACAA, the CSBG cost allocation plan, and the importance of holding fair and democratic low-income elections and accepting the elected representatives of the low-income communities.

Although Massey claims that the state played a major role in altering the composition of the Board by removing persons from the Board who would have voted to retain him and putting others on the Board who voted to terminate his employment, he has failed to identify a single Board member either removed from the Board or added to the Board at the state's request. There is no connection at all between any act of the state and the appointment or dismissal of any Board member.

Massey also claims that through Ann Kagie, the state engineered his termination. However, there is no evidence of any encouragement from the state or Kagie that Massey be terminated. Furthermore, Massey is unable to point to any evidence of a connection between the state or Kagie and the three employees who made the charges against him. Finally, there is no evidence the state or Kagie in any way influenced the Board's selection of the qualified independent investigator or even the Board's decision that an investigator should be retained.

Lugar requires that there be a showing that the deprivation was in some sense attributable to a governmental decision. *Lugar*, 457 U.S. at 938 and n.20. Massey cannot show that the alleged deprivation of his employment resulted from a governmental rule, policy, or decision. To the contrary, all the evidence indicates that Massey's employment was terminated after the independent investigator reported the results of her investigation on the employees' charges against Massey.

Because Massey failed to meet the first prong of the *Lugar* test, he failed to show state action here. Accordingly, the Petition must be denied.

III.

THE TENTH CIRCUIT APPLIED SETTLED LAW IN AFFIRMING SUMMARY JUDGMENT FOR OACAA ON MASSEY'S SECTION 1983 CLAIM.

Massey has not come forward with any evidence that OACAA acted under color of state law when it terminated his employment. To the contrary, the evidence shows that Massey's termination was directly caused by charges of misconduct asserted by three OACAA employees. The charges were brought to the Board's attention in August 1997, two months after the Board voted to retain Massey, despite the potential loss of substantially all funding due to OACAA's alleged failure to comply with regulations that govern such funding. There is no evidence of any connection between the state and the charges against Massey or the employees who asserted the charges.

In response to the employees' charges about Massey, the Board placed Massey on paid leave and hired an independent investigator to review the matter. The independent investigator, a licensed attorney, conducted an exhaustive investigation, interviewing numerous witnesses, including current and former employees and Board members. The investigator also interviewed Massey for two days with his lawyer present. The independent investigator's report detailed "substantial evidence" that supported most of the findings. No evidence exists of any connection between the state and the report from the independent investigator.

After reviewing the report, the Board met and terminated Massey's employment by a majority vote. No evidence exists that there was a state connection to the vote, and no evidence exists of any other immediate cause of Massey's termination. Thus, Massey's termination was not a result of Massey's exercising any right, privilege, or rule of conduct having its source in state authority. *Lugar*, 457 U.S. at 937. Massey's termination was directly caused by charges of misconduct asserted by three OACAA employees.

Massey failed to come forward with any evidence of a connection between the state and the charges against him or the employees who asserted the charges. Without a state connection to the termination, there is no state action, and without state action, there is no claim under Section 1983. Accordingly, this Court should refuse to grant Massey's Petition.

CONCLUSION

The *Brentwood Academy* decision has no effect on the Tenth Circuit's granting summary judgment in favor of OACAA. In *Brentwood Academy*, this Court merely set forth another test under which a Section 1983 plaintiff can establish state action – the entwinement test. In his Petition, Massey asks this Court to reconsider the arguments he made below in light of its decision in *Brentwood Academy*. This Court should decline to do so. Massey simply cannot show that the private character of OACAA was

"overborne by the pervasive entwinement of public institutions and public officials in its composition and workings." Furthermore, Massey cannot show that the termination of his employment resulted from Massey's exercise of a state right, privilege or rule of conduct. To the contrary, Massey's termination resulted from the independent investigator's substantiation of three employees' charges against him.

In summary, there is no cause for review in this case, the evidence does not support Massey's statement of facts, and the Tenth Circuit correctly upheld the grant of summary judgment for OACAA. Therefore, Massey's Petition must be denied.

DATED: September 7, 2001.

Respectfully submitted,

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